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February 7, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
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Room TWB204
Washington, D.C. 20554

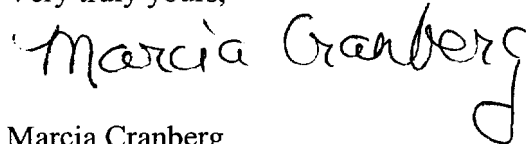
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CS Docket No. 00-2
Comments of the Office of the Commissioner of Baseball

Dear Ms. Salas:

Tendered herewith on behalf of the Office of the Commissioner of Baseball are an original and nine (9) copies of Comments submitted in the above-referenced rulemaking proceeding. These Comments are also being submitted on diskette to the Cable Services Bureau, in accordance with the instructions at ¶ 42 of the Notice of Proposed Rulemaking in this proceeding.

Very truly yours,



Marcia Cranberg

Enclosures

cc (w/paper encl.): Judy Boley
Virginia Huth, OMB

cc: (w/diskette encl.): Eloise Gore
ITS

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Satellite Home)	
Viewer Improvement Act of 1999;)	CS Docket No. 00-2
)	
Application of Network Nonduplication,)	
Syndicated Exclusivity, and Sports Blackout)	
Rules to Satellite Retransmissions)	
)	

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**COMMENTS OF THE
OFFICE OF THE COMMISSIONER OF BASEBALL**

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February 7, 2000

TABLE OF CONTENTS

SUMMARY	i
BACKGROUND	1
1. Nature Of Proceeding.....	1
2. Baseball's Telecasting Patterns	3
3. Sports Blackouts	4
DISCUSSION	5
SATELLITE CARRIERS SHOULD AFFORD THE SAME DEGREE OF SPORTS RULE PROTECTION AS DO CABLE OPERATORS.....	5
A. Purpose and Nature of the Sports Rule	5
B. Baseball's Experience Under The Sports Rule	8
C. Applicability Of The Sports Rule To Satellite Carriers	9
1. Nationally Delivered Superstations	9
2. Network Stations	10
D. Response To Commission Questions	12
CONCLUSION	14

SUMMARY

The Office of the Commissioner of Baseball (“Baseball”) urges the Commission to implement the requirements of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”) to extend the FCC’s Sports Rule (47 C.F.R. §76.67) to the retransmission by satellite carriers of both nationally delivered superstations and network stations. This would effectuate the underlying goal of the SHVIA by promoting parity between the cable and satellite industries.

First, in adopting implementing regulations, the Commission should require satellite carriers to afford Sports Rule protection without regard to the number of households that would be blacked out. The exemption for cable systems with fewer than 1,000 subscribers, adopted out of concern that small cable operators would not be able to afford expensive switching equipment to effectuate the required blackouts, has no applicability in the context of satellite carriers who now serve millions of subscribers and who already possess the necessary technology and expertise to provide sports blackouts.

Second, the relevant geographic protection zone should track as closely as possible the 35-mile zone of protection currently provided by the Sports Rule. The simplest method is to apply Sports Rule protection on a “zip code” basis. Carriers should be required to black out the telecast in all zip code areas that are located wholly or partially within the 35-mile specified zone.

Third, the timing of required Sports Rule notifications should be the same as is applicable to cable operators. Weather cancellations and changes in television schedules

make it particularly important that Baseball have the ability, as it does with cable, to afford no more than 24 hours' notice where such changes occur.

Fourth, Sports Rule protection should apply to digital, as well as analog, signals if the compulsory license under Section 119 of the U.S. Copyright Act in fact applies to digital signals.

Finally, while there may be very few instances where a satellite carrier will be required to afford Sports Rule protection against Baseball telecasts on network stations, there are situations where satellite subscribers in communities within 35 miles of where a sports event occurs will be able to receive distant network stations. In such cases satellite carriers should be required to afford the same Sports Rule protection that cable systems afford.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)

Implementation of the Satellite Home
Viewer Improvement Act of 1999;)

CS Docket No. 00-2

Application of Network Nonduplication,
Syndicated Exclusivity, and Sports Blackout
Rules to Satellite Retransmissions)

**COMMENTS OF THE
OFFICE OF THE COMMISSIONER OF BASEBALL**

The Office of the Commissioner of Baseball, on behalf of the thirty clubs engaged in the sport of major league baseball ("Baseball"), submits the following comments in response to the Commission's Notice of Proposed Rulemaking, FCC 00-4 (released January 7, 2000) ("Notice").

BACKGROUND

1. Nature Of Proceeding

In the Satellite Home Viewer Act of 1988 ("SHVA"), Congress accorded "satellite carriers" a compulsory license to retransmit certain television broadcast signals. The term "satellite carriers" refers to the Direct Broadcast Satellite ("DBS") operators, *i.e.*, DirecTV and EchoStar's DISH Network, and entities that provide television programming to Home Satellite Dish ("HSD") owners via C-band satellite frequencies.

The SHVA compulsory license was similar to the one that Congress had accorded cable operators in Section 111 of the Copyright Act of 1976, 17 U.S.C. § 111, but with at least one major difference. Satellite carriers, unlike cable operators, had no obligation to comply with any FCC rules as a condition of compulsory licensing. *See* 17 U.S.C. § 111(c)(1). Congress eliminated that difference in the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, Appendix 1 (1999) (“SHVIA”).

The SHVIA includes various provisions designed to promote parity between the cable and satellite industries. Among other things, the SHVIA creates a new Section 339 of the Communications Act, 47 U.S.C. § 339. Section 339(b) directs the Commission to extend to satellite carriers various cable television rules, including the “Sports Rule,” 47 C.F.R. § 76.67. The Sports Rule, originally adopted in 1975, authorizes Baseball and other sports rights owners to insist that a cable operator black out certain sports telecasts on out-of-market or distant broadcast stations that they retransmit. Section 339(b) states that the Commission shall apply the Sports Rule to the satellite carriers’ retransmission of “nationally delivered superstations” and “network stations.” It further states that Sports Rule protection should be afforded against retransmissions of network stations only “to the extent technically feasible and not economically prohibitive.”

The Commission initiated this proceeding to adopt rules implementing Section 339(b). In its January 7 Notice, the Commission seeks comment on a number of issues, including: (i) how to measure the relevant geographic zone in which Sports Rule protection should be afforded; (ii) whether satellite carriers should be exempt from affording Sports Rule protection where the telecast would be blacked out in fewer than

1,000 households; (iii) whether the time periods for requesting Sports Rule protection should be the same as those applicable to cable; and (iv) whether Sports Rule protection should be afforded against the retransmission of digital as well as analog signals.

2. Baseball's Telecasting Patterns

Baseball provides the American public with a substantial amount of television sports programming, including programming that is subject to the Sports Rule. Indeed, virtually every one of the 2430 regularly scheduled major league baseball games played each year is televised live; in most cases, there is more than one telecast of a particular game. These telecasts are made by a variety of rightsholders: (1) the clubs' "flagship stations," which are over-the-air television broadcast stations licensed to the community in which the club plays its home games; (2) affiliates of the flagships, consisting of full power and low power television stations and cable systems, that carry the flagship's telecasts to communities within the club's home territory; (3) regional cable networks, like Fox Sports New York and HTS, which distribute their telecasts of a club's games to cable and DBS subscribers located in the club's home territory; (4) the national cable networks -- ESPN, the fX Network and TBS, that televise games over their networks of affiliated cable systems, DBS systems and other multi-channel video programming distributors; and (5) Fox, which telecasts games on a national or regional basis over its network of broadcast stations.

In addition to these regular season telecasts, Baseball televises each of its post-season games -- the Division Series, the League Championship Series ("LCS") and the World Series. The LCS and World Series are telecast over a national broadcast television

network (Fox or NBC), while each Division Series game is televised by either a national broadcast television network (Fox or NBC) or a national cable network (ESPN).

Satellite subscribers, in particular, have access to a substantial number of Baseball telecasts. Each satellite subscriber may receive Baseball telecasts offered by the national broadcast and cable networks; by the regional cable network that offers service in his or her community; and, in many cases, by the flagship station or the affiliate of the flagship station that is available in that community. In addition, Baseball has created a package of telecasts that is available exclusively to satellite subscribers. Through “MLB Extra Innings,” a DirecTV (including Primestar) or C-band subscriber can view over 1000 telecasts (or more than five telecasts each day) of major league baseball games played outside that subscriber’s local market.

3. Sports Blackouts

Blackouts are and have been an integral part of virtually every sports telecasting arrangement negotiated in the marketplace. They are necessary to promote attendance at games, as well as to preserve grants of program exclusivity made to different rightsholders. They help encourage the overall supply of sports programming that is offered to the American public. Without the right to negotiate appropriate blackout arrangements in their contracts with different rightsholders, Baseball and other sports interests would not be able to present the vast number of telecasts that viewers throughout the country now enjoy.

Satellite carriers that offer packages of Baseball and other sports telecasts routinely afford blackout protection as a condition to receiving licenses for those telecasts. Satellite carriers must black out certain MLB Extra Innings telecasts in

particular geographic areas. To protect the exclusivity that the clubs have licensed to local rightsholders, Baseball authorizes the satellite carriers to offer only “out-of-market” Baseball telecasts as part of MLB Extra Innings. Thus, for example, the carrier could offer a telecast of a Chicago Cubs game throughout much of the nation, but it would be required to black out that telecast in the Cubs home market. The “reverse” blackout arrangement exists when a satellite carrier offers a regional cable network. A satellite carrier might offer, for example, an HTS telecast of an Orioles’ game in the Orioles’ market but would be required to black out that telecast in the remainder of the country. With respect to ESPN telecasts of Baseball games, the satellite carrier may be required to black out the telecast of a particular game in and around the city of one or both of the teams playing in that game – to protect gate receipts or the exclusive rights granted to a local rightsholder.

In short, affording Sports Rule protection is a new responsibility for satellite carriers that enjoy the privilege of compulsory licensing. However, for some time now, those carriers have been willing and able to afford blackout protection as part of negotiated licensing agreements.

DISCUSSION

SATELLITE CARRIERS SHOULD AFFORD THE SAME DEGREE OF SPORTS RULE PROTECTION AS DO CABLE OPERATORS

A. Purpose and Nature of the Sports Rule

At the urging of Baseball and the other sports leagues, the Commission adopted the “Sports Rule ” in 1975. *See “In re Amendment of Part 76 of the Commission’s Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports*

Programs on Cable Television Systems, Report and Order, 54 F.C.C. 2d 265 (1975) (“*Sports Rule Report and Order*”). The rule requires cable systems (generally, those within 35 miles of a specified point in the city where a sports event is taking place) to black out the visiting club’s distant signal telecast of a sports event that is not available on a local over-the-air television broadcast station.

By way of example, assume that the Pittsburgh Pirates and Chicago Cubs are playing a game in Pittsburgh. If the Pirates are not televising the game over their Pittsburgh flagship station (KDKA-TV), the Pirates may require cable systems in the Pittsburgh 35-mile specified zone to delete the Cubs’ telecast of that game on the Cubs’ flagship WGN-TV (Chicago, IL). If, however, the Pirates chose to televise the game on their flagship KDKA-TV, then the Pirates would not have the right to require deletion of the WGN-TV telecast of the game by Pittsburgh-area cable systems. During the 1999 season WGN-TV televised seven games between the Cubs and the Pirates – three of which were eligible for Sports Rule protection.

The FCC’s adoption of the Sports Rule was premised in significant part on the Congressional policy established in the 1961 Sports Broadcast Act. *See* 15 U.S.C. §§1291-1293. *See Sports Rule Report and Order*, 54 F.C.C. 2d 265 at ¶ 6. The Sports Broadcast Act generally exempts the major professional sports leagues from certain provisions of the antitrust laws, and sanctions the blackout of television broadcasts of games of the same league in the home territory of a team when it is playing at home. The Act codified an earlier federal court decision upholding certain National Football League blackout policies. *See United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961). An underlying purpose of the Act was to permit sports teams to protect their

home gate receipts from the adverse financial effects of invading telecasts of outside games.

The Commission likewise recognized that the Sports Rule, by protecting gate receipts, would help ensure “the continued general availability of sports programming to the public.” Notice at ¶ 24. Absent the protection afforded by the Sports Rule, a cable system could frustrate a home team’s decision not to televise a home game by importing the visiting team’s telecast of that game. To avoid that result, the home team would be compelled to deny the visiting club permission to televise the game, thereby depriving fans in the visiting club’s market from viewing that game on over-the-air broadcast television. *See Sports Rule Report and Order*, 54 F.C.C. 2d 265, ¶55.

In 1996 both Congress and the Commission reaffirmed the importance of the Sports Rule. When it enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(“1996 Act”), Congress mandated that the Commission extend the Sports Rule to Open Video System (OVS) operators. The Commission did so in *In re Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd. 18, 223 (1996), *codified at* 47 C.F.R. §76.1506(m). *See also In the Matter of In re Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 F.C.C.Rcd. 20, 227, ¶181 (1996)(“*OVS Report and Order*”)(modifying OVS rules to “preserve the same level of protection received by sports teams and leagues in the cable context”).

B. Baseball's Experience Under The Sports Rule

The Sports Rule affords substantially less protection than Baseball and the other sports leagues had sought – and, indeed, substantially less protection than is routinely provided in the marketplace. *See OVS Report and Order*, 11 F.C.C. Rcd. 20,277, ¶181 (“sports exclusivity requires infrequent deletions that cannot be recouped once missed”). Nevertheless, the protection that it does afford is critically important to Baseball and the other sports interests. Given the importance of that protection, during *each* of the 25 years since the Sports Rule went into effect in 1975, Baseball has vigorously enforced its rights under the Sports Rule. To do so, Baseball --

- Has compiled a list identifying each of the hundreds of cable systems subject to the Sports Rule;
- Routinely updates that list by monitoring various FCC releases and searching FCC records;
- Identifies at the beginning of each season the distant signal telecasts that must be blacked out pursuant to the Sports Rule;
- Prepares and mails Sports Rule notices to the hundreds of affected cable television systems in the country, specifying the telecasts that must be blacked out;
- Sends amendments to the annual notices where necessary;
- Responds to inquiries from cable systems and their subscribers concerning the notices; and
- Takes appropriate action in response to any violations of the blackout requirements, including the initiation of FCC proceedings where necessary.

As the above suggests, Baseball has spent a considerable amount of time, effort and expense enforcing its rights under the Sports Rule against cable systems and OVS operators.

C. Applicability Of The Sports Rule To Satellite Carriers

1. Nationally Delivered Superstations

The SHVIA directs the FCC to apply the Sports Rule to “the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers.” 47 U.S.C. §339(b)(1)(A). The term “nationally distributed superstation” is defined as a television broadcast station that (1) is not owned or operated by a television network that existed as of January 1, 1995; (2) was retransmitted by a satellite carrier and was not a network station on May 1, 1991; and (3) was retransmitted by a satellite carrier pursuant to a compulsory license as of July 1, 1998. *See* 47 U.S.C. §339(d)(2). In its Notice the Commission concluded that there are only six stations that meet this definition –

KTLA-TV (Los Angeles, CA)

KWGN-TV (Denver, CO)

WGN-TV (Chicago, IL)

WPIX-TV (New York, NY)

WSBK-TV (Boston, MA)

WWOR-TV (New York, NY)

Of the six “nationally delivered superstations,” four -- KTLA-TV, KWGN-TV, WGN-TV and WPIX-TV – are currently flagship stations of Baseball clubs. WSBK-TV and WWOR-TV are not currently Baseball flagships; however, they were flagships for many years in the past and could be flagships in the future.

The four nationally delivered superstations that currently are Baseball flagships televise a substantial number of regular season major league baseball games. As shown below, during the 1999 season, these stations collectively broadcast 322 major league baseball games.

**BASEBALL TELECASTS
BY NATIONALLY DISTRIBUTED
SUPERSTATIONS – 1999 SEASON**

<u>Superstation</u>	<u>Telecasts (Club)</u>
WGN-TV	90 (Cubs)
WGN-TV	55 (White Sox)
KWGN-TV	77 (Rockies)
KTLA-TV	50 (Dodgers)
WPIX-TV	<u>50 (Mets)</u>
TOTAL	322

Of these 322 telecasts, 73 qualified for protection under the Sports Rule.

2. Network Stations

The SHVIA also requires the Commission to establish regulations that “to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 C.F.R. §76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers.” 47 U.S.C. §339(b)(1)(B). The term “network station” is defined generally as a television broadcast station that “is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States.” 17 U.S.C. §119(d)(2). A significant number of the stations that carry Baseball telecasts meet that definition.

Unlike the situation with nationally delivered superstations, telecasts on network stations are subject to the Sports Rule only “to the extent technically feasible and not economically prohibitive.” Congress made clear, however, that:

The burden of showing that conforming to rules similar to cable would be “economically prohibitive” is a heavy one. *It would entail a very serious economic threat to the health of the carrier.* Without that showing, the rules should be as similar as possible to that applicable to cable services.

Conference Report on H.R. 1534, Intellectual Property and Communications Omnibus Reform Act of 1999: *Joint Explanatory Statement of the Committee of Conference*, 145 Cong. Rec. H.11769, 11796 (daily ed. Nov. 9, 1999) (emphasis added). Given the ability of satellite carriers to routinely afford blackout protections in connection with licensed sports packages, Baseball does not believe that the carriers can meet this heavy burden.

As a practical matter, there may be very few instances where a carrier will in fact be required to afford Sports Rule protection against Baseball telecasts on network stations. *See Notice at ¶ 26.* That is because the Sports Rule generally applies only within 35 miles of the community where a sports event occurs, and carriers generally are not permitted to retransmit network stations into such communities. However, as the Commission has recognized, there are situations where satellite subscribers in such communities will be able to receive distant network stations. *See Notice at ¶ 26 n.65.* In such cases the Commission should require the carrier to afford the same Sports Rule protection that cable systems afford. Indeed, it would be inconsistent with the policies underlying the SHVIA to permit satellite carriers to deliver a particular sports telecast to satellite subscribers within a particular neighborhood while a cable system serving that same neighborhood would not be permitted to do so under the Sports Rule.

D. Response To Commission Questions

The Commission's Notice raises several questions concerning the applicability of the Sports Rule. Baseball submits the following responses.

First, satellite carriers should afford Sports Rule protection without regard to the number of households that would be blacked out. *See* Notice at ¶ 25. It is correct, as the Commission observes, that cable systems with fewer than 1,000 subscribers are not subject to the Sports Rule. That exemption, however, was largely adopted out of concern that small cable operators would not be able to afford expensive switching equipment in order to effectuate the required blackouts. *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems*, Memorandum Opinion and Order, 56 F.C.C. 2d 561, ¶29 (1975); *In re Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, First Report and Order, 63 F.C.C. 2d 956, ¶¶53-58 (1977); *In re Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, Second Report and Order, 68 F.C.C. 2d 18, ¶34 (1978). Such a concern has no applicability in the context of satellite carriers who now serve millions of subscribers. Moreover, satellite carriers already possess the necessary technology and expertise to provide sports blackouts, which constitute an integral part of daily business for the satellite industry. *See* pages 4-5, *supra*.

Second, the relevant geographic protection zone should track as closely as possible the zone of protection currently provided by the Sports Rule. *See* Notice at ¶ 30.

The Sports Rule requires blackout protection throughout any cable system “community unit” located in whole or in part within the 35-mile specified zone (which is measured from a designated reference point in the community where the Baseball game is played). *See* 47 C.F.R. §76.67(a). Because the “community unit” concept has no relevance in the satellite carrier context, Notice at ¶ 30, Baseball agrees with the Commission that the simplest method is to apply Sports Rule protection on a “zip code” basis. The carrier should be required to black out the telecast in all zip code areas that are located wholly or partially within the 35-mile specified zone.

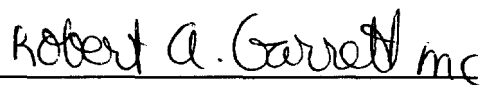
Third, the timing of Sports Rule notifications should be the same as for cable operators – namely, no later than the Monday preceding the calendar week during which the program deletion is to be made and, as to events not regularly scheduled and revisions of notices previously submitted, within 24 hours after the time of the telecast to be deleted is known but no later than 24 hours from the time the subject telecast is to take place. *See* 47 C.F.R. §76.67(c). Baseball routinely serves its Sports Rule notice at the beginning of the season for the entire season. However, because weather conditions can often impact game and telecasting schedules for Baseball, it is particularly important that Baseball have the ability to afford no more than 24 hours’ notice where changes do occur – regardless of whether the notice is sent to a cable operator or to a satellite carrier.

Finally, the Commission raised a question as to whether Congress intended that the Sports Rule be applied to digital, as well as analog, signals. *See* Notice at ¶ 36. If the Section 119 compulsory license in fact applies to digital signals, Sports Rule protection also should apply. The policies underlying the Sports Rule are equally relevant regardless of whether the invading telecast is made by a digital or an analog station.

CONCLUSION

For the reasons set forth above, the Commission should extend the Sports Rule to the retransmission by satellite carriers of both nationally delivered superstations and network stations.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert A. Garrett" followed by a stylized "mc".

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